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REVIEWS AND CRITICISMS

DER UNGARISCHE ENTWURF UBER DIE UNVERBESSERLICHEN VERBRECKER, Von Dr. jur Erwin Hacker, Sonderabdruck aus der Monatschrift für Kriminal-psychologie und Strafrechtsreform, Juli 1914.

DAS UNGARISCHE GESETZ UBER DIE GEMEINGEFÄHRLICHEN ARBEITS-SCHUEEN (Gestez, Artikel XXI von 1913), mitgeteilt von Dr. E. Hacker, Sonderabdruck aus den Blättern für Gefängniskunde, 1914.

These two articles bring to our attention recent legislation of Hungary which reveals the influence of modern ideas in radical form. The influence of American ideas is not mentioned but it is manifest. When these laws come into effect, Hungary will have some of the best elements of our indeterminate sentence and parole laws. The "work-shy" will find himself in a workhouse acquiring skill and industrious habits for an indefinite period, but not to exceed five years. The insane are carefully excluded from this group. Not the degree of guilt of the act but the dangerous character of the actor becomes the decisive consideration. A parole board is to be connected with each workhouse. The period of conditional release is one year. The convict who breaks his parole can be returned for cause, but only by a court, and the police keep him under surveillance,—a serious defect.

The bill relating to incorrigible convicts rests on the same advanced principles. The Hungarian criminal code was formed on a "classical" basis in 1878, but in 1908 and 1913 steps were taken to bring it up to date, and while awaiting a complete reform this partial measure has been introduced. The juvenile delinquents have already been brought under a rational procedure and the administration of child saving work is well organized. Hungary has a vigorous group of reformers who are making themselves heard and felt.

University of Chicago.

C. R. HENDERSON.

DER ENTWURF EINES DEUTSCHEN STRAFGESETZBUCHES. Nach den Beschlüssen der Strafrechtskommission systematisch Bearbeitet von Dr. L. Ebermayer, Reichsgerichtsrat, stellvertreter-Vorsitzenden der Strafrechtskommission. Berlin, Verlag von Otto Liebmann, 1914.

DIE POSTULATE DER INTERNATIONALEN KRIMINALISTISCHEN VEREINIGUNG UND DIE BESCHLÜSSE ZWEIER STRAFRECHTSKOMMISSIONEN. *Mitteilungen der Internationalen Kriminalistischen Vereinigung*, Bd. xxi, Heft I, 1914.

When any great nation undertakes such a piece of house-cleaning as the reform of her system of penal law, she merits the respectful attention of us all, whether lawyers, criminalists, or laymen. This job Germany has undertaken. After twenty-five years of persistent scientific study and educational propaganda on the part of the Internationale Kriminalistische Vereinigung, and, on top of that, two Imperial Commissions sitting some six years, the fruitage appears in the shape of a detailed project of law covering a very large area of penal law. Dr. L. Ebermayer, vice-president of the last *Strafrechtskommission*, has recently published a summary of the findings and conclusions of

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the Commission. In his abstract of the Commission's work, which is most carefully and methodically done, the final decisions of the Commission are compared with those of the preceding larger body whose conclusions and recommendations were recorded in the so-called *Vorentwurf*, published in 1909. In some respects the *Vorentwurf* was narrower and less progressive in tendency than the *Entwurf* which is to furnish the basis for proposed legislation. Both, however, rest to no small extent upon the work of the *I. K. V.*, and particularly its crystallization in the great sixteen volume compilation on comparative criminal law issued co-operatively by Kahl, von Liszt, Wachs and other scholars. Dr. Ebermayer's analysis of the *Entwurf* gains historical perspective when read in conjunction with an article by his colleague on the Commission, Dr. Karl Meyer, published in the *Festband* of the *I. K. V.* early in 1914.

After going through these two studies from this standpoint I find perhaps ten or a dozen distinct lines of reform in the *Entwurf*, (Draft Code,) showing pretty clearly the influence of the *I. K. V.* and its teaching. The Union throughout its history has steered clear of affiliations with any one criminological sect or party. And Dr. Meyer is careful to point out that the Commission likewise has avoided such special alliances. The new German code will exploit no particular "school;" but it is not therefore necessarily eclectic, nor a mere hash-work of compromise. In every case the Commission applied the touchstone of "practical necessity." The fact that it adopted in so many words the *I. K. V.*'s classification of criminals, particularly that part which refers to habitual and incorrigible criminals, is no exception to its general rule; for the *I. K. V.* itself includes criminalists of widely divergent ideas; this classification represents ground common to all. The attempt to find some satisfactory practical and legal concept of responsibility not tied up with the old free-will controversy, indicates also the hand of the Union. Other evidence crops out in the emphasis the Commission lays on measures for juvenile delinquents, for preventive measures in general, for probation, rehabilitation of criminals, enlarged discretionary powers of judges, and special institutions for the inebriate or the mentally defective criminal. Finally, the *Entwurf* in its cautious but sure approach in the direction of a general indeterminate sentence shows needs of the Union's sowing. Parenthetically let us say that sentiment in favor of the indeterminate sentence is growing steadily if slowly throughout Germany. The superintendent of the famous Brauweiler Workhouse near Cologne confessed to me last summer that he was an optimist, and for that reason was sure his country would be thoroughly converted to the indeterminate sentence in fifty years! To anthropologists half a century is but a fragment of a second of cosmic time. Hence it would have been too much to expect these commissions to come out radically for such a reform so early in the day.

The *Entwurf* is rather a formidable document of 428 paragraphs, systematically arranged in two books; the first covers serious crimes and delictions; the second, minor offenses. This division of subject

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follows the general tendency to separate the criminal from the police code. Dr. Ebermayer's analysis goes through the *Entwurf* paragraph by paragraph, pointing out the details in which the proposed revision differs from the code now in force. It is not our intention to follow him in minute detail, but to indicate briefly those proposals which are most likely to strike the interest of the average American student.

In the first place, the common German division of offenses into *Verbrechen*, *Vergehen* and *Ubertretungen* is accepted. Some slight changes occur in the character of penalties prescribed. Recapititation, however, is retained as the death penalty. To the three present forms of deprivation of liberty, namely, penitentiary (*Zuchthaus*), prison (*Gefängnis*), and short jail sentences (*Haft*), both Commissions added a fourth, committal to a special institution, or to a special section of a penal institution, from which ordinary prisoners are excluded (*Einschliessung, custodia honesta*). *Zuchthausstrafe* may be for life, or from one to fifteen years. *Gefängnisstrafe*, from one day to five years, unless otherwise specified by law. *Einschliessung*, from one day to fifteen years. *Haft*, one day to three months, unless otherwise specified by law. Short sentence offenders are supposed to maintain themselves by their own labor while undergoing sentence, and to be kept separate from other prisoners. Solitary confinement is prescribed for the first three months of any sentence to penitentiary or prison; short sentences are to be served wholly in solitary; exceptions may, however, be allowed in the prison regulations. Crimes manifesting special brutality or cruelty are to be punished with special forms of severity during the first thirty days of incarceration; but sickness, pregnancy, etc., may relieve the prisoner in part from this increased severity.

Fines are retained, ranging from 3 to 5,000 Marks. Payment in instalments is permitted. In cases of financial inability, only, is payment in labor allowed or to be exacted. Fines up to 50,000 Marks may be prescribed in addition to other penalties for crimes of cupidity.

Loss of civil rights is added to penalties for certain types of crime; but many exceptions are allowed, considerable discretion permitted to judges and prosecutors, and provisions made for rehabilitation.

Judicial reprimand is still maintained, in spite of charges of its futility. It must be administered by the judge himself, and orally as a rule.

Little change is proposed in the present law regarding restitution for damage done; the present maximum figure of 20,000 Marks stands; but, in the future, allowance of a claim for restitution bars the way for civil damages.

In the attempt to work out a practicable concept of "responsibility," the Commission avoided all that debatable ground which surrounds theories of free will and determinism, and chose the middle course already established by German court practice. In terms of the modern controversy between the "Classical" and the "Positive" schools of criminologists, it may be said that the Commission adheres to a rather liberal form of the classical doctrine of penal responsibility.

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Its basic maxim "*keine Strafe ohne Schuld*" is expressed in the draft code in the general principle that those only are penally responsible who commit acts through intent or neglect. No attempt is made to assess the full and absolute social consequences of a given criminal act, nor to prescribe punishment on that basis. While such an attitude cannot be called reactionary, it evidently goes little beyond the *status quo* from the standpoint of criminological theory. Yet the recognition of three milder types of murder, the permission accorded to courts to consider motives and circumstances in every criminal trial, the recognition of mental retardation in the case of some minors between the ages of 14 and 18, the emphasis upon the necessity for special types of institutions for criminal defectives, and a certain liberality in handling the whole category of the mentally weak, indicates a break with the older and more rigid concept of responsibility, and also a tendency to accept more generally the notion of individualizing punishment.

The tendency is all the more noticeable in the provision made for suspended sentence, probation and parole. Probation, so far as we can gather from Dr. Ebermayer, is to be somewhat more widely and more strictly administered. Heretofore, after a successful probationary period, the probationer automatically passed from under the impending sentence. In the future, however, the court releasing the offender under suspended sentence must at the end of the probationary period (two to five years for serious crimes, one to two years for minor offenses), formally determine whether sentence shall be set aside or pronounced. Moreover, the court may recall the probationer at any time to give an account of himself, and, if necessary, pronounce the original sentence. A former single short sentence (Haft) is not necessarily a bar to probation if the terms of the former sentence have been fully complied with. In general it may be said that the Commission gives due if not even liberal attention to the whole question of mitigating circumstances. Hence the inclination to invoke other than institutional methods with milder offenders.

Conditional liberation or parole occupies considerable space in the findings of both Commissions. The second Commission finally decided that parole should be accorded offenders from all four types of penal institutions. Those from the Zuchthaus must have served three-fourths of their term, or a minimum of one year; those from Gefängnis, Einschliessung, or Haft, two-thirds of their term, with a minimum of at least six months. They may or may not be released under definite supervision. At present, apparently, this phase of the matter is to be left to the legislative and administrative authorities of the individual states of the empire. And on the whole the tendency seems to be to allow private initiative to cover this field of preventive and rehabilitative work. Private societies like the English Borstal Association or our own Prisoners' Aid Societies are favored rather than public officials. Three ostensible reasons account at least in part for this attitude: First, parole is still in its experimental stage; second, it is a moral work, better adapted to private religious or moral agencies than

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to public authorities; third, it must be dissociated from all notions of police activity. After reading this draft code, and after talking with prison administrators in Germany last summer, I cannot help feeling that the Commission should have gone farther in the direction of providing for a definite body of properly trained public parole officers. This, however, in no way disparages the faithful work done by pastors, teachers, and other private agencies attempting to care for paroled prisoners. Anybody who takes the trouble to read through the reports that these workers send in to, say, such an institution as the Wittlich Reformatory, cannot fail to be impressed with the fact that much enviable good work is accomplished by them. But if parole work is to grow properly it must have its backbone in a specialized corps of public officers whose qualifications, salaries, and dignity shall be fully the equal of those enjoyed by institutional staffs. But the Commission has not seen the matter in this light. On the other hand the Commission is to be commended for having extended the principle of parole to persons released from institutions for the criminal-inebriate and mentally defective.

In the matter of rehabilitation the draft code provides that in certain cases not only may civil rights be restored to an offender, but that after twenty years of good conduct following the completion of a penalty all official records of the judgment and penalty may be expunged. In the case of minors the time is cut in half.

While the offender who "makes good" is thus rewarded, the recidivist, the habitual, and the incorrigible are to receive proportionate discouragement. An offender is to be reckoned habitual after five serious offenses committed either at home or abroad, one at least of which entailed committal to the Zuchthaus; he is to be committed to the Zuchthaus if the new offense, when considered with former delictions, indicates a professional or habitual life of crime. If the new offense is a serious misdemeanor the penalty must not be less than two years; if a felony, up to five years imprisonment. Offenses committed abroad are to be reckoned if they are punishable according to German law, and if they entailed at least one year's imprisonment. Such habitual or professional criminals after release, are to be placed under indeterminate supervision by the police, with this restriction, that a regular court must formally order an extension of the period of supervision if it is deemed wise to prolong it beyond three years. If no further trouble occurs within five years the offender passes from under supervision.

Among the special types of penal institutions stressed by the Commission must be reckoned inebriate asylums and workhouses. Offenders committing criminal acts while under the influence of liquor, and who are habitual drunkards, may be committed to an inebriate asylum for a period of not to exceed two years. They may also be placed under supervision after discharge, and may be returned to the institution for relapses. The courts may prohibit these habitual inebriates and also certain other minor offenders from visiting saloons and like places. The workhouse is to be considered a reformatory rather than

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a penal institution ; hence it is limited to the care of what might be called the "middle-class" of wrong-doers, the beggars, tramps, gamesters, work-shy, etc. It is to be used as a by-means in connection with committal to prison or jail. Terms range from one year down to two weeks. We may perhaps be permitted to register a doubt as to the efficacy of short workhouse sentences. The records of German workhouses, both compulsory and voluntary, show a discouraging percentage of "rounders."

The *Entwurf* in its section on offenses against public morals adds a stringent paragraph on the white slave traffic, and also introduces important amendments to existing statutes on pornographic objects and literature. Abortion and advertising means for procuring abortion are handled in the conventional way.

I have reserved till the last the Commission's treatment of the juvenile delinquent. Not that the *Entwurf* is in the least radical ; to the contrary, it does not go so far as we might have desired. Yet the progressive tone is unmistakable. In the first place, the age of criminal responsibility is raised from twelve to fourteen years. In addition, children over fourteen but not yet eighteen, who on account of mental or moral retardation have not attained sufficient moral discernment, may be relieved from punishment and placed under some educational authority (guardianship, probation, or institutional care). Separate and distinct children's courts are not specified, as all matters of procedure have been left to another prospective Commission. However, Dr. Meyer assures us that the Commission is in heartiest sympathy with the principles of recent juvenile court legislation in Germany. The need for special attention to cases of adults contributing to the delinquency of minors was not overlooked by either the *Entwurf* or the *Vorentwurf*. This must be set down as another instance of a pretty well-defined policy of prevention.

Scattered through this brief review of Germany's proposed penal code reforms are hints that perhaps some clearly justifiable desiderata are not to be quite satisfied in the new legislation. For instance, to us, the retention of beheading as the death penalty appears distinctly unprogressive. Again, the proposed code, in spite of its attention to reformation and prevention, clings more closely than we might have hoped to the principle of punishment as retribution. And it fails to incorporate fully the principle of the indeterminate sentence. What the recommendations of some future Commission will be on the question of a more flexible procedure, of course we cannot say ; they might go a considerable way towards carrying out the spirit if not the letter of the indeterminate sentence. Perhaps, again, a shade too much is made of the short sentence ; but a wider use of fines by instalments, of probation, parole, and measures against professional and habitual criminals might eliminate this nuisance and my objection. Finally, it is a matter of regret that the *Entwurf* does not frankly provide for public parole agencies.

On the whole, however, Dr. Ebermayer, Dr. Meyer, and their colleagues on both Commissions are to be highly commended for their

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faithful, painstaking work. It was a thankless job. May their efforts bear the same fruitage of fame that has come to the work of their illustrious countryman, Anselm Feuerbach, who just a century ago published the great Bavarian Penal Code.

University of Pittsburg.

ARTHUR J. TODD.

UN GRANDE ISTITUTO DI PROTEZIONE PER GLI EMIGRANTI. By *Prof. Ugo Conti*. *Rivista di Roma*, Vol. V, No. 4, Feb. 1914. pp. 96-107.

Professor Conti's article is nominally a review of the immigration work done by the industrial department of the Y. M. C. A.; but here and there the author launches out into a general critique of American immigration policy. He finds the Y. M. C. A. to be a patriotic and assimilative rather than narrow confessional agency; and quite agrees with them in their methods and purposes in so far as they are striving to combat and prevent crime and other social evils. He appreciates quite highly their *individual* protective measures for the immigrant (in the steerage, at the landing stage, on the way to his job, etc.); also enumerates favorably its various *social* protective schemes—schools, recreation centers, etc.; he furthermore commends its co-operation, especially in New York, with Italian agencies for the protection and welfare of Italian immigrants. But he differs strongly on the general policy of Americanization pursued by the Y. M. C. A. and other public and private institutions. "The new Crusade," said the Y. M. C. A. in one of its pamphlets, "is against foreign colonies on American soil. The United States must be homogeneous to subdue the continent and you can help make it so." Against this militant patriotism and against the insinuation of a twentieth century "barbarian invasion" Professor Conti tilts vigorously. As a reply to this effort to make Americans out of Italians he urges upon his own country the policy of developing means for insuring that immigrants from Italian soil remain Italians. "We must for our part," he says, "make every effort to maintain Italians as Italians, and at least in any case facilitate the repatriation of native Italians." The work of the Dante Alighieri Society is cited as an example of what might be done. Emigration he holds is an evil on principle: Let us have exportation of things, not of men!

As a criminologist he makes two or three acute suggestions. To remedy the tendency toward emigration he insists that his own country must develop internal colonization; a beginning might be made with penal colonies, to be followed by free colonists. The sequel might not be precisely what Professor Conti anticipates, but there is no doubt that plenty of free land lies idle in Southern Italy, ready for occupation by penal farm colonies. Both as penological and agricultural experiments they are well worth a trial.

While deploring the high illiteracy percentages among his countrymen, he opposes our suggested literacy test on the ground that it is not from the unlettered that the worst forms of delinquency are recruited. We do not need to answer his protest except to point out that combatting immigrant illiteracy means draining off stores of energy that might be devoted to other pressing social problems.